Supreme Court, U.S.
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No. 02-209

In the Supreme Court of the United States

PETER N. FERNANDEZ, III, PETER N. FERNANDEZ, JR., AND KENNETH K. GETTY,

Petitioners,

v.

UNITED STATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS

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The United States acknowledges that the courts of appeals are divided on the question of whether 18 U.S.C. § 666 requires a nexus between the alleged offense conduct and a federal government interest. Opp. 6. Compare *United States* v. *Zwick*, 199 F.3d 672, 687 (3d Cir. 1999) (Section 666 requires the government to show some connection between a federal interest and the bribe); *United States* v. *Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999) (same), with *United States* v. *Fernandez*, 282 F.3d 500, 511 (7th Cir. 2002) (Section 666 does not require a nexus or link between a federal interest and the bribe); *United States* v. *Suarez*, 263 F.3d 468, 489-91 (6th Cir. 2001).[1]

The divided panel decisions in *Suarez* and *United States* v. *Lipscomb*, 299 F.3d 303 (5th Cir. 2002), both of which generated strong, well-reasoned dissents on the issue presented here, highlights the division among the circuits. In *Suarez*, Judge Boggs agreed with the Second and Third Circuits, reasoning that "the jurisdictional requirement of minimal federal nexus is a necessary element of 18 U.S.C. § 666 in order to maintain the constitutionality of the statute." 263 F.3d at 488 (Boggs, J., dissenting). To decide otherwise "would

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[1] The Eleventh Circuit has also recently addressed the issue in *United States* v. *Edgar*, 304 F.3d 1320 (11th Cir. 2002). In affirming the conviction of officers of a hospital that received reimbursements under the Medicare, Part A program, the Eleventh Circuit acknowledged the constitutional concerns expressed in *Zwick* and *Santopietro*. However, given this Court's construction of the term "benefits" in *United States* v. *Fischer*, 529 U.S. 667 (2000), the court concluded that the necessary constitutional limits "are built in to § 666's requirement that recipient entities receive at least $10,000 in federal 'benefits' over the course of a year." 304 F.3d at 1325. In addition, the court noted that "*Fischer* clearly vindicated § 666's constitutionality as applied to the defrauding of entities funded by Medicare." *Id.* at 1329.

make § 666 a generalized anti-corruption statute under the spending power." *Id.* at 489 (quotation omitted).

In *Lipscomb*, two judges of a triply divided panel considered an as applied challenge to the constitutionality of Section 666. Judge Wiener determined that Congress's interest in preventing federal funds from passing through state and local government bodies and agencies whose members and agents are corrupt suffices to make Section 666 "necessary and proper to Congress's exercise of its spending power." 299 F.3d at 336-37 (Weiner, J.). Accordingly, in Judge Weiner's view, Section 666 requires only that federal funds pass through the governmental body or agency; the government need not prove any nexus or connection between the federal funds or programs and the bribery.

In contrast, Judge Smith argued that for prosecutions under Section 666 to be constitutional, there must be some relationship between federal funds or programs and the bribery. 299 F.3d at 372 (Smith, J., dissenting) ("it cannot be a necessary and proper to executing the federal spending power for the government to prosecute local crimes that have no relationship whatsoever to federal funds and programs"). Like Judge Boggs, Judge Smith went on to note that if Section 666 did not require any relationship between federal funds or programs and the bribery, then the statute "would become a general federal police power statute that criminalizes corruption in all local governments and private agencies receiving federal funds." *Id.*[2]

Implicitly acknowledging that the divergent decisions of the courts of appeals cannot be harmonized, the United States is limited to contending that this case is not an "appropriate vehicle" for resolving the circuit split. Opp. 7. In this regard,

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[2] Judge Duhé, the third member of the panel, did not reach the constitutional question, because he did not believe it to be properly before the court. See 299 F.3d at 360 (Duhé, J., dissenting in part).

the government principally argues that this case does not present an appropriate vehicle because petitioners' conduct "satisfies the nexus requirement that the Second and Third Circuits have established." *Id.*

In particular, the government argues that petitioners meet the standard set forth in *Santopietro* and *Zwick* because the alleged bribery here involved the chief executive of a municipality. Opp. 7-8. The government contends that a defendant's status as the chief executive of an organization that receives federal funds *ipso facto* satisfies the nexus between a federal interest and the offense conduct required by the Second and Third Circuits. The government is incorrect. The basis for the government's contention is a solitary dictum in a footnote (that makes note of the issue and reserves it for another day) in *Santopietro*. See 166 F.3d at 94 n.3, cited at Opp. 8. But nothing in the holdings of *Zwick* (which does not mention the chief executive issue) or *Santopietro*, or the dissents of Judges Smith and Boggs in *Lipscomb* and *Suarez*, suggests that these courts or judges would find a defendant's status as a chief executive to suffice under Section 666. The government's argument regarding the status of one of the petitioners as a chief executive thus properly belongs in its merits brief or its brief on remand—not in its opposition to the petition for certiorari.

The government also briefly contends that the resolution of the first question presented "would not have a significant practical effect on petitioners," because petitioners' sentences are being served concurrently and vacatur of their Section 666 convictions "would affect only the size of their special assessments." Opp. 9. Notwithstanding the government's assertion to the contrary, both a decrease in petitioners' special assessments, as well as the prospect of one fewer felony conviction, are matters of significant importance to petitioners.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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